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**ATTORNEYS FOR PLAINTIFF JANE DOE**

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

JANE DOE, an individual using a  
pseudonym,

Plaintiff,

v.

UBER TECHNOLOGIES, INC.,  
RASIER, LCC, RASIER CA, LLC,

Defendants.

Case No. 3:19-cv-03310-JSC

**PLAINTIFF JANE DOE'S  
BOYFRIEND'S OPPOSITION TO  
DEFENDANTS' MOTION TO  
COMPEL DEPOSITION  
TESTIMONY**

Judge: Hon. Jacqueline Scott Corley  
Date: March 11, 2022  
Time: 10:00 a.m.  
Crtrm.: E

**Assigned to Magistrate Judge  
Jacqueline Scott Corley**

Action Filed: June 12, 2019  
Trial Date: September 12, 2022

**I. INTRODUCTION**

Ms. Doe experienced a horrific ordeal and continues to suffer from PTSD and is easily triggered and that can be crippling. More than three years later, she at times still breaks down into uncontrollable sobbing when she discusses topics related to the incident. Her boyfriend, Cuauhtli Padilla, is her rock. Ever since the beginning of Ms. Doe's relationship with her counsel, her boyfriend has been there to support

1 her and to translate the communications. Without his assistance, Ms. Doe's counsel  
 2 would not have been able to accomplish the objectives of the representation  
 3 throughout this matter.

4 This motion presents multiple issues that, if time permitted, might be raised  
 5 via other procedural vehicles, including a motion for a protective order pursuant to  
 6 Federal Rules of Civil Procedure 30(d)(3). Due to timing constraints, these various  
 7 issues have been informally combined in the present motion, but Plaintiff asks the  
 8 Court to consider these substantive issues on their merits.

## 9 **II. RELEVANT FACTUAL BACKGROUND**

10 On August 14, 2018, Plaintiff Jane Doe was the victim of a violent sexual  
 11 assault. [Davis decl. at ¶2.] Ms. Doe has consistently described a harrowing event.  
 12 She was 20 years old at the time of the assault. She stands about 5 feet tall and  
 13 weighs less than 100 lbs. Her assailant is over 6 feet tall and athletic. Her assailant  
 14 drove her to a secluded turnout in the mountains. He pinned her down in the rear  
 15 seat of the car and strangled her until she submitted to his sexual assault. She told  
 16 the assailant that she was pregnant, which was a false statement, and this  
 17 apparently caused him to interrupt the assault. He then started driving to another  
 18 location and muttered things that caused Ms. Doe to believe that he was going to  
 19 rape her again and then murder her. As he was pulling into a parking lot Ms. Doe  
 20 managed to open a door and jump out of the car. The assailant initially stopped the  
 21 car, but when a passerby came to Ms. Doe's assistance, the assailant fled the scene in  
 22 his car. He was not apprehended at that time. [*Id.* at ¶3.]

23 The initial contact to plaintiff's counsel's office on behalf of Ms. Doe was made  
 24 by her boyfriend, Mr. Padilla. When Ms. Doe's counsel first with met her on or about  
 25 August 23, 2018, Mr. Padilla was present. [*Id.* at ¶¶4-5.] During the initial  
 26 interaction with Ms. Doe, Mr. Padilla provided emotional support with remarkable  
 27 tenderness and kindness. He comforted Ms. Doe each time she broke down in tears,  
 28 which occurred on several occasions. He also translated during the meeting. [*Id.* at

¶¶6-7.]

In the numerous occasions plaintiff's counsel has communicated with Ms. Doe since the initial meeting, Mr. Padilla's presence has been necessary both to facilitate effective communication through translation and to provide emotional support. [*Id.* at ¶¶8-9.]

Uber's counsel deposed Mr. Padilla on February 9, 2022. [*Id.* at ¶25.] When Uber's counsel asked Mr. Padilla about communications he helped facilitate between Ms. Doe and her counsel, Plaintiff's counsel made the following offer:

So Mr. Padilla was serving as both a translator and emotional support for the plaintiff, and so he was a necessary party to the attorney-client communication. And I could instruct him not to answer on that basis; however, I understand he's also a fact witness in the case and I would permit him to answer these questions provided Uber stipulate that that's not a waiver of the attorney-client privilege with respect to the plaintiff. [*Id.* at 237:11-20.]<sup>1</sup>

Uber declined to enter this stipulation. [*Id.* at ¶¶26-27.]

### III. ARGUMENT

#### A. Federal Procedural Law Applies, but California Law Applies to Privilege and Privacy

In a case like this one, questions of privilege and privacy are controlled by state law, whereas procedural questions are governed by Federal law. See Fed. R. Evid. 501; *In re California Public Utilities Com'n*, 892 F.2d 778, 781 (9th Cir. 1989) ("In diversity actions, questions of privilege are controlled by state law."); *Oakes v. Halvorsen Marine Ltd.*, 179 F.R.D. 281, 284 (C.D. Cal. 1998) ("To the extent privacy is a matter of privilege under state law, federal courts will honor the privilege and protect the responding party from discovery.")

The applicable procedural standard is that, as a general rule, "instructions not to answer questions at a deposition are improper." *Detoy v. City and County of San Francisco*, 196 F.R.D. 362, 365 (N.D.Cal.2000). Under Federal Rule of Civil

<sup>1</sup> Ms. Doe confirmed that Mr. Padilla both translated and provided emotional support during her communications with counsel. [Doe deposition at 101:6-10.]

1 Procedure 30(c)(2), a party may instruct a deponent not to answer only when  
 2 necessary: (1) to preserve a privilege, (2) to enforce a limitation ordered by the court,  
 3 or (3) to present a motion under Rule 30(d)(3)—specifically, a motion to terminate or  
 4 limit the deposition “on the ground that it is being conducted in bad faith or in a  
 5 manner that unreasonably annoys, embarrasses, or oppresses the deponent or party.”  
 6 Fed.R.Civ.P. 30(c)(2), (d)(3). There is “a substantial preference for requiring that  
 7 deponents apply to the court for protection rather than simply refusing to answer  
 8 questions.” *Brincko v. Rio Properties, Inc.*, 278 F.R.D. 576, 584 (D. Nev. 2011) citing  
 9 8A Wright, Miller and Marcus, Federal Practice and Procedure, 3d Ed. Civil § 2113,  
 10 p. 589. However, “it would be ‘unduly draconian’ to find that a failure to file a motion  
 11 under Rule 30(d) precludes consideration of the matter on the merits. *Id.* This is  
 12 particularly true here, given that Uber raised this issue with the Court during the  
 13 deposition via its informal discovery resolution process, and there was no opportunity  
 14 to plaintiff to first request a protective order. (See Davis Declaration paragraph 39.)

15 **B. When Plaintiff’s Counsel Instructed Not to Answer, It was On**  
 16 **the Proper Grounds of Privilege, Privacy, and Abusive**  
 17 **Questioning**

18 When plaintiff’s counsel instructed Mr. Padilla not to answer questions, it was  
 19 because those questions (1) improperly sought privileged information where Ms.  
 20 Doe’s boyfriend was acting as her agent for the purpose of relaying privileged  
 21 communications, or (2) were designed to embarrass, abuse, and oppress by seeking,  
 22 for example, detailed information about plaintiff’s and Mr. Padilla’s sexual practices.  
 23 For example, after asking about the frequency with which Mr. Padilla and the  
 24 plaintiff had sexual intercourse prior to the incident, defense counsel pressed, “Was  
 this -- was this vaginal sex? Oral sex? Anal sex?” [Davis decl. ¶25.]

25 **C. Plaintiff’s Counsel Properly Limited Questioning Regarding Ms.**  
 26 **Doe’s Sexual History**

27 Rule 412 applies in both civil and criminal cases and it safeguards victims of  
 28 sexual violence against overly intrusive questioning regarding their sexual practices.

1 The advisory committee notes to the 1994 amendments to Rule 412 provide insight  
2 into the purpose of the Rule and its applicability to discovery:

3 [Rule 412] aims to safeguard the alleged victim against the  
4 invasion of privacy, potential embarrassment and sexual  
5 stereotyping that is associated with public disclosure of  
6 intimate sexual details and the infusion of sexual innuendo  
7 into the factfinding process. By affording victims protection  
8 in most instances, the rule also encourages victims of  
9 sexual misconduct to institute and to participate in legal  
10 proceedings against alleged offenders.

11 Rule 412 seeks to achieve these objectives by barring  
12 evidence relating to the alleged victim's sexual behavior or  
13 alleged sexual predisposition, whether offered as  
14 substantive evidence or for impeachment, except in  
15 designated circumstances in which the probative value of  
16 the evidence significantly outweighs possible harm to the  
17 victim.

18 ...

19 Past sexual activities connotes all activities that involve  
20 actual physical conduct, i.e. sexual intercourse or sexual  
21 contact. [Citations.]

22 ...

23 [Rule 412] also exclude[s] all other evidence relating to an  
24 alleged victim of sexual misconduct that is offered to prove  
25 a sexual predisposition. This amendment is designed to  
26 exclude evidence that does not directly refer to sexual  
27 activities or thoughts but that the proponent believes may  
28 have a sexual connotation for the factfinder. Admission of  
such evidence would contravene Rule 412's objectives of  
shielding the alleged victim from potential embarrassment  
and safe guarding the victim against stereotypical  
thinking. Consequently, unless the (b)(2) exception is  
satisfied, evidence such as that relating to the alleged  
victim's mode of dress, speech, or life-style will not be  
admissible.

...

The reason for extending Rule 412 to civil cases is equally  
obvious. The need to protect alleged victims against  
invasions of privacy, potential embarrassment, and  
unwarranted sexual stereotyping, and the wish to  
encourage victims to come forward when they have been  
sexually molested do not disappear because the context has  
shifted from a criminal prosecution to a claim for damages  
or injunctive relief. There is a strong social policy in not  
only punishing those who engage in sexual misconduct, but  
in also providing relief to the victim. Thus Rule 4–12

1 applies in any civil case in which a person claims to be the  
 2 victim of sexual misconduct, such as actions for sexual  
 battery or sexual harassment.

3 FED.R.EVID. 412 Advisory Committee's notes.

4 Although Rule 412 governs the admissibility of sexual behavior evidence  
 5 rather than its discoverability, Courts apply the principles underlying the Rule to  
 6 questions of discoverability as well. See *Doe v. City of San Diego*, No. 12-CV-0689-  
 7 MMA DHB, 2013 WL 3989193, at \*3–4 (S.D. Cal. Aug. 1, 2013) (citing numerous  
 8 cases to support the conclusion that the majority of district courts that have  
 9 addressed whether Rule 412 is applicable to discovery have held that it is relevant in  
 10 the resolution of a discovery dispute.) In *Doe v. City of San Diego*, the court concluded  
 11 that “inquiry into Plaintiff’s sexual history and behavior is reasonably calculated to  
 12 lead to the discovery of admissible evidence [because] Plaintiff has alleged that the  
 13 sexual assault perpetrated by Defendant Arevalos has caused her to suffer emotional  
 14 distress, among other things.” *Doe v. City of San Diego*, No. 12-CV-0689-MMA DHB,  
 15 2013 WL 3989193, at \*5 (S.D. Cal. Aug. 1, 2013). Nevertheless the court went on:  
 16 “the question becomes whether the discovery should be precluded under Rule 26,  
 17 notwithstanding its relevance” and it the court ultimately limited deposition  
 18 questioning finding that: “Such testimony on the topics proposed by Defendants  
 19 would be unduly intrusive and embarrassing.” *Doe v. City of San Diego*, No. 12-CV-  
 20 0689-MMA DHB, 2013 WL 3989193, at \*5 (S.D. Cal. Aug. 1, 2013).

21 Moreover, Mr. Padilla is not a party to this action. Under California law, he  
 22 has privacy rights with respect to his sexual activities. See, e.g., *Britt v. Superior*  
 23 *Court*, 20 Cal.3d 844, 864 (1978) (“the First Amendment provides substantial  
 24 protection of an individual’s interest in associational privacy and that it places severe  
 25 restrictions on state-compelled disclosure of private affiliations and activities”).  
 26 Federal courts recognize a constitutional right to privacy encompassing a right to  
 27 nondisclosure of one’s personal information. See also *Stallworth v. Brollini*, 288  
 28 F.R.D. 439, 444 (N.D. Cal. Dec. 21, 2012) (citing *Whalen v. Roe*, 429 U.S. 589, 599, 97



1 S.Ct. 869, 51 L.Ed.2d 64 (1977)); *Laub v. Horbaczewski*, 331 F.R.D. 516, 522 (C.D.  
 2 Cal. 2019) (resolution of privacy objections generally requires balancing the need for  
 3 the particular information against the privacy right asserted).

4 **D. The Attorney-Client Privilege Extends to Plaintiff's Boyfriend**  
 5 **Because, Under the Totality of the Circumstances, He Was a**  
 6 **Necessary Party to Those Communications.**

7 Under California law, a “confidential communication between client and  
 8 lawyer” is privileged from disclosure. Cal. Evid. Code § 954. A communication falls  
 9 within the scope of this privilege if it is information transmitted between a client and  
 10 his or her lawyer in the course of that relationship and in confidence by a means  
 11 which, so far as the client is aware, discloses the information to no third persons  
 12 other than those who are present to further the interest of the client in the  
 13 consultation or those to whom disclosure is reasonably necessary for the transmission  
 14 of the information or the accomplishment of the purpose for which the lawyer is  
 15 consulted, and includes a legal opinion formed and the advice given by the lawyer in  
 16 the course of that relationship. *Id.* § 952. *Snyder v. Alight Sols., LLC*, No.  
 821CV00187CJCKESX, 2021 WL 6103185, at \*2 (C.D. Cal. Dec. 8, 2021)

17 Here, Ms. Doe speaks limited English and was and remains severely  
 18 traumatized by what happened. As a victim of a violent sexual assault, she needed  
 19 the physical presence of her devoted boyfriend to overcome the frequent emotional  
 20 breakdowns that are triggered when discussing topics related to the incident. She  
 21 trusted him over everyone else. He also was needed to help translate. It would have  
 22 been impossible for counsel to effectively communicate with Ms. Doe without his  
 23 presence. Mr. Padilla’s presence was “reasonably necessary for the transmission of  
 24 the information or the accomplishment of the purpose for which the lawyer is  
 25 consulted.” Cal. Evid. Code § 952.. The attorney-client privilege applies to  
 26 communications that are made through an interpreter. *See City & County of San*  
 27 *Francisco v. Superior Court In and For City and County of San Francisco*, 37 Cal.2d  
 28 227, 237 (1951); *see also U.S. v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961).

In arguing that communications with a client's boyfriend do not create a privileged relationship, Defendant relies on *Integon Preferred Insurance Company v. Saavedra*, No. CV 18-6689-GW(RAOX), 2019 WL 13075956, at \*1 (C.D. Cal. Oct. 24, 2019). Yet, as quoted by Defense counsel in their motion, that court in that case recognized that the boyfriend was not "a language translator." The same is not true here.

#### IV. CONCLUSION

For the foregoing reasons, Plaintiff requests that the motion be denied.

Dated: March 9, 2022

WALKUP, MELODIA, KELLY & SCHOENBERGER

By:



MATTHEW D. DAVIS  
SARA M. PETERS  
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**CERTIFICATE OF SERVICE**

**Jane Doe v. Uber, et. al.**  
**Case No. 3:19-cv-03310-JSC**

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the county where the mailing took place. My business address is 650 California Street, 26th Floor, City and County of San Francisco, CA 94108-2615.

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**PLAINTIFF JANE DOE'S BOYFRIEND'S OPPOSITION TO DEFENDANTS' MOTION TO COMPEL DEPOSITION TESTIMONY**

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on March 9, 2022, at San Francisco, California.



Kirsten Benzien